85-1629

No. ——

Supreme Court, U.S.
FILED
APR 4 1986
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO, AND LOCAL 100 OF THE INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO-CLC,
Petitioners,

v.

JAMES HOWARD and ROBERT BATES, individually and on behalf of all others similarly situated, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a labor union may be held liable for a violation of Title VII of the Civil Rights Act of 1964 or of 42 U.S.C. § 1981 solely because the union failed to make "every reasonable effort" to ensure that an employer complied with Title VII.

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Petitioners,

v.

JAMES HOWARD and ROBERT BATES, individually and on behalf of all others similarly situated, *et al.*,

Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The International Molders and Allied Workers Union, AFL-CIO-CLC, and Local 100 of the International Molders and Allied Workers Union, AFL-CIO-CLC, hereby

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[1] In addition to the parties listed in the caption, the following were also plaintiff-intervenors in the district court and appellants in the court of appeals: Willie L. McCoy, Jimmie L. Rodgers, Harold Wood, Franklin Wood, James Knox, Fayte Jones, Robert Mathews, Jr., Willie McGinnis, James H. Patterson, J. G. Robinson, Mack Fritz, Wilbert Hogan, Charles Judkins, Louis J. Moore, Joe L. Steele, James Croom, Johnnie Tolbert, Adolph Hillary, III, Robert G. Harris, Richard S. Barnes, Arthur Berry, Wilbur Wilson, Jr., Jonathan Jones, Willie A. Neeley, Larry Ware, and Larry Robinson. The following were also plaintiff-intervenors in the district court: Wallace H. Warren, Robert Gray, Jr., James P. Perkins, Samuel L. Ramsey, and Mack Greathouse. Clow Corporation was also named as a defendant in the district court, but entered into a settlement with the plaintiffs prior to trial.

petition for a writ of certiorari to enable this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Howard, et al. v. International Molders and Allied Workers Union, AFL-CIO-CLC, et al.*, C.A. No. 85-7008, entered on January 14, 1986.

OPINIONS BELOW

The district court's findings of fact and conclusions of law are unreported; they are reprinted in the Appendix to this petition as Appendix B (16a-60a). The subsequent opinion of the district court on issuing final judgment is likewise unreported and is reprinted as Appendix E (76a-77a); an amendment to that opinion is reprinted as Appendix G (79a).

The opinion of the court of appeals is reported at 779 F.2d 1546 and is reprinted as Appendix A (1a-15a).

JURISDICTION

The court of appeals entered judgment on January 14, 1986. A timely petition for rehearing was denied on February 18, 1986. Appendix H (80a-81a). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 703(c) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(c), provides:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities,

> or would limit such employment or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

On September 13, 1977, respondents commenced this employment discrimination lawsuit on behalf of all black employees at the Tarrant City, Alabama, plant of Clow Corporation. Named as defendants were Clow; petitioner Local 100 of the International Molders and Allied Workers Union; and petitioner International Molders and Allied Workers Union, the local union's parent organization. (The local and international are referred to herein collectively as "the union.") The union was the exclusive bargaining representative of the hourly employees at Clow's Tarrant City plant.

Plaintiff's complaint alleged that Clow had committed various unlawful employment practices, including that "the defendant company used unvalidated tests which have a disparate impact on blacks and cannot be justified by business necessity." The complaint alleged that the union had not "made any effort to attempt to correct or

modify the policy or practice of racial discrimination heretofore alleged."

The facts pertinent to the question presented in this petition—as established by the undisputed evidence and the findings of the district court which were affirmed by the court of appeals—are as follows.

Labor-management relations at Clow followed the normal pattern for an industrial workplace. Clow had complete control over all hirings, promotions, terminations, and other employment decisions, except to the extent that Clow agreed in collective bargaining with the union to follow particular rules or practices. The union could attempt to change the employer's practices by negotiating new contract provisions or by filing grievances to allege that some practice violated an existing contract provision.

The workforce at Clow, and the local union's membership, were approximately 50 percent black and 50 percent white. Black members were very active in the local union's affairs, and were regularly elected as officers. The union processed grievances for both black and white employees in approximately equal numbers and pursued grievances as aggressively for black employees as for whites.

Prior to the start of each round of negotiations, the local union held a special meeting to formulate the union's bargaining demands. That meeting was, of course, equally open to black and white members, and "[t]here is no evidence . . . of intimidation or coercion practiced against black employees or that the union was dominated by a hostile white majority." App. 46a. To the contrary, the "important local union committees," including the negotiating committee and the grievance committee, were composed of approximately equal numbers of blacks and whites at all relevant times. *Id.*

Prior to the filing of this lawsuit, Clow administered a standardized test, known as the Bennett Mechanical Comprehension Test (hereinafter "the test"), to employees who sought promotions or transfers into some of the jobs in the plant. The district court found that the test had a disparate impact on black employees and that the test had not been proven to be job-related.

The collective bargaining agreement between Clow and the union was silent on the subject of testing; the union had not agreed to Clow's use of the test, nor had the union obtained any contractual provision that expressly limited testing by Clow.

During the limitations period—from May 1975 to June 1980—union representatives protested to Clow on at least one occasion about Clow's testing.[2] But no union member ever asked the union to make testing a subject of collective bargaining, and the union never demanded during contract negotiations that the company cease using the test. The district court found that this omission was *not* the result of an attempt by the union to "alter[] the bargaining strategy to the detriment of black employees," or of "excluding blacks from participation in the internal affairs of the union or the collective bargaining process, or of failing to heed black suggestions for changes in the labor contracts." App. 44a. That court added: "The court cannot equate failure to achieve in collective bargaining with failure to achieve because of racial animosity." *Id.*

The district court nonetheless held the union liable for Clow's testing. That court held that with respect "to a labor organization's conduct that is challenged under [§ 703(c)(3) of Title VII,] 42 U.S.C. § 2000e-2(c)(3)" —which makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against

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[2] The union had made a like protest in 1970, prior to the start of the limitations period. The limitations period ended in June 1980 because Clow closed the Tarrant City plant at that time.

an individual in violation of [Title VII]"—the applicable legal standard is whether the union has "tak[en] every reasonable step to ensure that the employer complie[d] with Title VII." App. 57a-58a & n.17. The district court found that the union here had failed to " 'prove[] to the full satisfaction of the courts' " that it had done so. App. 51a, *quoting from Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1129 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982). That court concluded further that "conduct which violates the section [§ 703(c)(3)] constitutes intentional discrimination," and that therefore the union's failure to negotiate for elimination of the test also violated 42 U.S.C. § 1981. App. 58a & n.19.

After entering these findings of liability, the district court referred the case to a special master to determine the amount of backpay or damages that should be awarded against the union. The special master found that the class of plaintiffs had suffered no monetary loss as a result of Clow's use of the test in question and that therefore damages should not be awarded.[3] The district court accepted the report of the special master and entered final judgment in favor of the union. App. 78a. In an accompanying opinion, that court observed that its earlier liability ruling under § 1981—that the union's failure to take "every reasonable step" to eliminate the test constituted intentional discrimination prohibited by 42 U.S.C. § 1981—was "likely incorrect," and that "[t]he court did not and does not make the finding that there was other-

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[3] The master based this determination on his finding that, despite the test, during the limitations period black employees at Clow had filled more than half of the vacancies in jobs for which the test was required. The court of appeals held that under this Court's decision in *Connecticut v. Teal*, 457 U.S. 450 (1982), this was a legally insufficient basis for denying backpay. App. 10a-14a. Petitioners do not seek review of that ruling here.

wise direct or circumstantial proof of intentional discrimination." App. 76a & n.1.[4]

The plaintiffs appealed to the Court of Appeals for the Eleventh Circuit, challenging the district court's refusal to award any backpay. The union cross-appealed, contending that the district court had erred in finding union liability based solely on the union's failure to press for elimination of the employer's test. The court of appeals ruled that the union was properly found liable because it "did not use all reasonable effort to cause the employer to put an end to the use of the non-validated tests for promotion." App. 14a. The court of appeals also reversed the district court's denial of relief to the plaintiff class, and remanded the case to the district court for identification of the individuals who had been injured and for determination of the amount of backpay or damages.

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[4] Because of the statement quoted in text, petitioners do not believe that the district court ultimately found union liability under 42 U.S.C. § 1981. The court of appeals did not expressly rule on the § 1981 claim. App. 9a-10a. On the off chance, however, that the decision below could be deemed to be based on § 1981 as well as Title VII, we have framed the Question Presented to include both statutory provisions. If the decision below were premised on § 1981 as well as Title VII, the ruling under § 1981 would merit this Court's review on certiorari for all the reasons set forth in this petition, and also for the reason that such a ruling would conflict with this Court's decision in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), in which the Court held that § 1981 prohibits only intentional discrimination and does not "impose an affirmative obligation to ensure that blacks enjoy [the] right" to be free from discrimination, nor does it make defendants "guarantors of workers' rights as against third parties who would infringe them." *Id.* at 396.

If certiorari is granted, petitioners will show that under *General Building Contractors*, § 1981 cannot furnish an alternative ground for reaching the same result as was reached below under Title VII.

REASONS FOR GRANTING THE PETITION

The decision below imposes on labor unions an extraordinary duty: the duty to make all reasonable efforts to prevent another, independent entity over which the union has no control—an employer—from violating the law. The appellate court found that duty in § 703(c)(3) of Title VII of the Civil Rights Act of 1964, even though that section, in terms, provides only that a union shall not "*cause or attempt to cause*" an employer to discriminate. And the appellate court held that unless a union discharges its duty to prevent employer discrimination, the union is liable for the employer's wrongs, even though, as this Court has said in a related context, statutory words such as these "cannot be easily read to impose liability vicariously." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 692 (1978).[5]

The decision below merits plenary consideration by this Court for two reasons.

First, the decision's strained and unlikely reading of § 703(c)(3) conflicts with a decision of the Seventh Circuit holding that union liability may *not* be premised on a union's mere failure to make affirmative efforts to prevent employer discrimination. The need to resolve this conflict is sharpened by the fact that the decisions of the lower federal courts are in general disarray over the questions whether a union may be held liable for failing to prevent an employer from violating Title VII and, if so, in what circumstances that liability attaches.

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[5] The lower court's construction of § 703(c)(3) is even more unlikely when it is recalled that the language of § 703(c)(3) was taken *in haec verba* from § 8(b)(2) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(2), and that the latter section has never been understood to impose a like obligation on unions to prevent employers from discriminating within the meaning of the NLRA. *See, e.g., Glasser v. NLRB*, 395 F.2d 401, 406 (2d Cir. 1968); *NLRB v. Jarka Corp.*, 198 F.2d 618, 621 (3d Cir. 1952).

Second, the decision below is fundamentally at odds with the national labor policy. The only way unions differ from anyone else with regard to what employers do is that unions engage in collective bargaining with employers as provided for in the federal labor laws. Under the decision below, unions are required to attach the highest priority, in bargaining, to remedying employer discrimination. Yet the entire theory of the national labor policy is that federal law should not dictate substantive bargaining priorities or results, but should leave the parties to arrive at their own bargaining agendas and their own agreements. And the very point of Title VII, as of other employee-protective legislation, is to confer substantive rights on workers directly—rights that exist *independently of any collective bargaining agreement* and that are *independently enforceable by each worker* without intervention by his or her bargaining representative. The decision below thus imposes on unions a duty that is not part of Title VII's statutory scheme and that threatens fundamentally to undermine the national labor policy of free collective bargaining.

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

There is no doubt that, under Title VII, a union that engages in discriminatory conduct commits an unlawful employment practice. Such union liability is explicit in the statute, in §§ 703(c)(1) and (c)(2), which parallel the language of §§ 703(a)(1) and (a)(2), the sections which define unlawful employment practices by employers. Nor is there any doubt that a union is liable when it induces an employer to discriminate, or even attempts to do so. That ground for liability is also explicit in the statute, in § 703(c)(3). The disputed question is whether under § 703(c)(3) a union is guilty of "caus[ing] or attempt[ing] to cause" an employer to discriminate simply because the union fails to make affirmative efforts to keep an employer from discriminating.

The lower federal courts have struggled with this question for over fifteen years, without guidance from this Court.[6] A number of the courts have held, like the court below, that unions have an affirmative duty to combat employer discrimination.[7] But in *Williams v.*

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[6] The only employment-discrimination case in this Court which even remotely touches on the question presented herein is *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976). In *McDonald*, the primary issue was whether discrimination by an employer against white employees in meting out discipline violates Title VII. There was a secondary issue of union liability in *McDonald* based on allegations in the complaint that the union had "acquiesced and/or joined in" the company's alleged racial discrimination by negotiating a lighter penalty for a black employee than for white employees charged with the same misconduct. *Id.* at 284. The lower courts dismissed the complaint as to all defendants, holding that employees who admit having committed a crime against their employer cannot invoke the protection of Title VII. *Id.* at 278. This Court reversed and reinstated the complaint. *Id.* at 283. On the issue of union liability, the Court explained its holding as follows:

> The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them. [*Id.* at 285.]

As the quoted sentence demonstrates, the Court understood the complaint in *McDonald* to allege that the union had "take[n] [race] into account" in negotiating a compromise that favored a black employee over the whites. Such an action would constitute intentional discrimination by the union, not failure to oppose employer discrimination. Nonetheless, some lower courts have construed *McDonald* to support the theory that unions are liable simply because they fail to make affirmative efforts to stop an employer from discriminating. *E.g., Goodman v. Lukens Steel Co.*, 777 F.2d 113, 126-27 (3d Cir. 1985).

[7] *E.g., Goodman v. Lukens Steel Co.*, 777 F.2d 113, 126-27 (3d Cir. 1985); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 314 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); *Macklin v. Spector Motor Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 478 F.2d 979, 989 (1973); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 282 (N.D. Ind. 1977); *Dickerson v. U.S. Steel Corp.*, 439 F. Supp.

General Foods Corp., 492 F.2d 399 (7th Cir. 1974), the Seventh Circuit reached the opposite conclusion. In *Williams*, the plaintiffs sued the employer for maintaining a sexually discriminatory policy in regard to overtime. The *Williams* plaintiffs sued the union as well, alleging that the union "failed to protect the female members of the Company from said discriminatory policies and practices." 492 F.2d at 405. The court of appeals affirmed dismissal of the complaint against the unions, declaring: "*Mere failure by the Unions to protect female employees from discriminatory Corporation policies . . . is insufficient to establish liability.*" *Id.* (emphasis added).[8]

Although the *Williams* decision was based on a claimed breach of the union's duty of fair representation and the

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55, 62-63 (E.D. Pa. 1977); *Hairston v. McLean Trucking Co.*, 62 F.R.D. 642, 667, 673-75 (M.D.N.C. 1974), *vacated on other grounds*, 520 F.2d 226 (4th Cir. 1975); *United States v. Bethlehem Steel Corp.*, 312 F. Supp. 977, 988-91 (W.D.N.Y. 1970), *modified on other grounds*, 446 F.2d 652 (2d Cir. 1971).

In addition to these cases that have held that unions are liable for failure to take action against an employer's discriminatory practices, other Circuits have articulated this same theory of union liability in cases that involved direct union participation in the alleged discrimination, *viz*, negotiating an unlawful contract provision. *E.g., Terrell v. United States Pipe & Foundry Co., supra*, 644 F.2d at 1120-21; *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1304 (9th Cir. 1982); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976). *See also Romero v. Union Pacific R.R.*, 615 F.2d 1303, 1310-11 (10th Cir. 1980).

[8] A number of district courts have reached the same conclusion in Title VII actions. *E.g., Ivey v. Western Electric Co.*, 23 F.E.P. 1012 (N.D. Ga. 1977); *Mills v. Fox*, 421 F. Supp. 519 (E.D.N.Y. 1976); *Ruckel v. Essex International, Inc.*, 14 F.E.P. 403 (N.D. Ind. 1976); *Meadows v. Ford Motor Co.*, 6 F.E.P. 795 (W.D. Ky. 1973); *Rosenfeld v. Southern Pacific Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968). *See also Golden v. International Ass'n of Firefighters Local 55*, 633 F.2d 817, 820-21 (9th Cir. 1980).

instant case involves the union's duty under § 703(c)(3) of Title VII, the two cases cannot be reconciled.[9] The plaintiffs' complaint in the instant case alleged only a fair representation violation by the union. The lower courts based their decision on § 703(c)(3) of Title VII because they understood that section to be coextensive with the duty of fair representation. Those courts thus found a Title VII violation by expressly applying the "standard . . . measuring the duty of the Union *under its obligation of fair representation.*" App. 2a (appellate court decision characterizing district court opinion) (emphasis added).

This reliance on what the court below perceived to be fair-representation principles accords with other decisions construing Title VII to impose on unions affirmative obligations to oppose employer discrimination. Beginning with Judge Skelly Wright's seminal decision in *Macklin v. Spector Motor Freight*, *supra*, 478 F.2d at 989, those cases have assumed that the duty of fair representation obligates a union "to negotiate actively for nondiscriminatory treatment in aid of its black members" and have held that Title VII must be deemed to incorporate the same duty.[10] Thus there is an unmistakable conflict among the circuits as to whether federal law requires unions to prevent employer discrimination.[11]

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[9] The *Williams* plaintiffs had alleged a Title VII count in their complaint but that count was dismissed for failure to name the unions in any EEOC charge. 492 F.2d at 405.

[10] See also cases cited in note 7, *supra*.

[11] That conflict is heightened—and the confusion in the lower courts intensified—by the Sixth Circuit's decision in *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974). That case involved a no-transfer rule which the employer enforced during the six-year limitations period in that case, from 1966-1972. The rule, which was neither contained in nor prohibited by the applicable collective bargaining agreements, prevented black employees from transferring into the all-white classification of over-the-road driver. No black employee ever requested that the

II. THE DECISION BELOW IS FUNDAMENTALLY AT ODDS WITH THE NATIONAL LABOR POLICY.

There is a second reason why the issue presented in this case merits plenary review by this Court: the decision below is fundamentally at odds with the national labor policy.

The starting point for analysis is the recognition that employers and unions are separate and autonomous en-

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union attempt to bargain away the rule, and the only action the union took in opposition to the rule was that in 1967, a year or more after the limitations period began, the union made one proposal in bargaining to eliminate the no-transfer rule. The court held that the union could not be held liable for the employer's maintenance of the no-transfer rule "when all the proof shows [is] that [the union] had knowledge of the employer's alleged discrimination, and that it did not initiate any action to stop it until 1967." *Id.* at 426.

In subsequent decisions, without recognizing the apparent conflict with *Thornton*, the Sixth Circuit has expressly embraced the theory that a union has an affirr ıtive duty under Title VII to attempt to eliminate employee discrimination. *Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1104-05 (6th Cir. 1981); *Smith v. South Central Bell Telephone Co.*, 518 F.2d 68, 70-71 (6th Cir. 1975); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 314 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977). In light of these subsequent Sixth Circuit cases, it may be that *Thornton* is best read as holding either (1) that a union's duty under § 703(c)(3) to challenge employer discrimination arises only when it is requested to do so by an affected employee, or (2) that so long as a union makes some *bona fide* effort to combat employer discrimination, the union discharges its (supposed) affirmative duty under § 703(c)(3), even if the union has not taken "every reasonable step" to stop the discrimination. (At least one other court has held that only *bona fide* efforts are required to discharge this duty. *Green v. U.S. Steel Corp.*, 481 F. Supp. 295, 313-14 (E.D. Pa. 1979); *Dickerson v. U.S. Steel Corp.*, 439 F. Supp. 55, 83 (E.D. Pa. 1977).)

On either of these readings, the decision below is in conflict with *Thornton*, as the decision below requires a union to act without request to do so and obligates a union to make "*every* reasonable effort" to combat employer discrimination. Plainly, under the rule adopted by the court below, the union in *Thornton* would *not* have been exonerated from liability.

tities—entities which " 'proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.' " *General Building Contractors Ass'n v. Pennsylvania, supra*, 458 U.S. at 394. Moreover, in the "absen[ce of] a collective bargaining agreement," under our labor system "[m]anagement hires and fires, pays and promotes, supervises and plans. All these are part of its function, and . . . may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960). A union has the ability to affect management's conduct in running the business only to the extent that the union is able to secure collectively-bargained limitations on these managerial powers.

Given these realities, the holding below requiring unions to make "every reasonable effort" to prevent employer discrimination means, as a practical matter, that unions must do everything reasonably within their power in collective bargaining to secure contractual provisions proscribing employment practices that adversely affect minority employees. That holding directly intrudes on the collective bargaining process. And such intrusion is inimical to the national labor policy.

"The goal of federal labor policy . . . is . . . to encourage the employer and the representatives of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959). That goal is "served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." *Id.* The parties thus determine their own bargaining agendas and their own priorities and make their own compromises and agreements. "[G]overnment may not step in and become party to the negotiations," *Golden State Transit Co. v. Los Angeles*, —— U.S. ——, No. 84-1644, Slip op. at 11 (April 1, 1986), because

Congress "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences," *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960).[12] Indeed, "the fundamental premise on which the [National Labor Relations] Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract," *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

The duty of fair representation has been carefully crafted to reflect these principles. That duty has been built on the premise that "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), as "union discretion is essential to the proper functioning of the collective bargaining system," *Electrical Workers v. Foust*, 442 U.S. 42, 51 (1979). The duty recognizes that it is the union's function to "balanc[e] individual and collective interests" so as to develop proposals and strategies that produce "increased benefits for workers in the bargaining unit as a whole." *Barrentine v. Arkanses-Best Freight System*, 450 U.S. 728, 742 (1981). Thus, so long as a union arrives at its bargaining positions "honestly, in good faith, and without hostility or arbitrary discrimination," the duty of fair representation is not offended regardless of the *substance* of the union's positions, even where the

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[12] In *Insurance Agents*, the Court held that the National Labor Relations Board is not free to proscribe the use of certain economic weapons because by doing so the Board "would be in a position to exercise considerable influence upon the substantive terms on which the parties contract" which would "amount[] to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced." 361 U.S. at 490, 498. The decision below much more clearly intrudes upon "the substantive aspects of the bargaining process" by requiring unions to make "every reasonable effort" to procure contractual provisions governing certain subjects.

union's position is "contrary to that of some individuals whom it represents" or "support[s] the position of one group of employees against that of another." *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964).

Precisely because this is so, when Congress has thought it necessary or appropriate for employees to enjoy particular protections regardless of their collective strength or their collective decisions or priorities, Congress has not compelled unions to bargain for that protection. Instead Congress has enacted statutes directly establishing the necessary affirmative protections—statutes like the FLSA,[13] OSHA,[14] ERISA,[15] and Title VII. And in these instances Congress has *not* imposed on unions the duty to enforce these statutory provisions, but has created governmental authorities and/or private causes of action (often with fee awards to prevailing plaintiffs) to do the enforcement job. These statutes thus create "federal minimal employment standards" which are " 'independent of the collective bargaining process' " and that " 'devolve on [employees] as individual workers and not as members of a collective organization.' " *Metropolitan Life Insurance Co. v. Massachusetts*, —— U.S. ——, 53 L.W. 4616, 4624 (June 3, 1985).[16]

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[13] The Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*

[14] The Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*

[15] The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*

[16] Because these rights "devolve on employees as individual workers and not as members of a collective organization," it is no part of a union's duty of fair representation to enforce these statutory rights. "[T]he duty of fair representation . . . is coextensive with [the union's] statutory authority to act as the exclusive representative for all employees within the unit." *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 376 n.22 (1984). The duty does *not* extend to those areas in which the individual employee is entirely free to protect his own interests, incuding the enforcement of individual statutory rights.

The decision below thus turns the national labor policy entirely on its head. Unlike the duty of fair representation, the decision below delves deeply into the bargaining process by imposing on each union an affirmative duty to make "every reasonable effort" to obtain anti-discrimination contractual provisions. Because such "contractual rights and remedies against discrimination"—like any other contractual right that a union secures—"must result from other concessions already made by the union as part of the economic bargain struck with the employer," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974), the duty the court below has read into Title VII effectively fixes bargaining priorities for unions. Under the decision below unions are compelled to subordinate other bargaining aims to the goal of securing contractual provisions that duplicate the protections already conferred by Title VII. This is true regardless of the other pressing problems that the represented group of employees may face—problems as to which there usually is no statutory protection and as to which the employees are wholly dependent upon whatever contractual rights they can obtain by dint of their collective strength. Furthermore, the duty created by the court below exists even where no employee has requested the union to expend its bargaining power on securing contractual provisions that parallel the provisions of Title VII. And the duty exists regardless of the union's bargaining strength or lack thereof.[17]

Imposing such a duty on a union and holding the union liable for an employer's wrongs unless a court finds that the union advanced all of the demands it was required to advance, pressed those demands with sufficient vigor,

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[17] Requiring unions to bargain for contractual provisions paralleling Title VII's prohibitions on employment discrimination seems particularly inappropriate given this Court's determination that "[a]rbitral procedures"—through which such contractual provisions would be enforced—provide a "comparatively inappropriate forum for the final resolution of rights created by Title VII." *Alexander v. Gardner-Denver, supra,* 415 U.S. at 56.

and made only "reasonable" compromises, can only destabilize collective-bargaining relationships and interfere with the parties' ability to reach agreements reflecting their needs and desires without resort to economic warfare. Such a requirement thus will defeat the overall aim of the national labor policy: enabling employers and employees "to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Teamsters Union v. Oliver, supra,* 358 U.S. at 295.[18]

This Court previously has held that the congressional policy of eliminating discrimination "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA." *Emporium Capwell Co. v. Western Addition Community Org.,* 420 U.S. 50, 69 (1975). *See also TWA v. Hardison,* 432 U.S. 63, 79 (1977). And this is the last case in which the national labor policy should be deemed to have been compromised by the enactment of Title VII. For Congress enacted Title VII for the very purpose of creating rights that would be independent of "majoritarian processes"; indeed, Title VII rights "can form no part of the collective bargaining process," because to make Title VII rights dependent upon the outcome of collective bargaining "would defeat the paramount congressional purpose behind Title VII." *Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 51. Title VII thus confers on each

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[1] The extent to which the lower courts have gone in policing a union's efforts to combat employment discrimination, under the theory of union liability embraced by the court below, is indicated by the decision in *Goodman v. Lukens Steel Co.,* 580 F.Supp. 1114, 1159 (E.D. Pa. 1984), *aff'd,* 777 F.2d 113 (3rd Cir. 1985). In that case a union was held liable for an employer's use of tests notwithstanding the fact that the union had consistently "object[ed] to [the employer's] use of tests of all kinds" and had sought the elimination of the tests on the ground that they were not job-related. To the court, the union had failed to meet its affirmative duty under § 703(c)(3) because the union had not expressly argued to the employer that the tests had a racially disparate impact.

employee, as an individual, an indefeasible right to be free from employment discrimination. And Title VII both establishes a procedure by which any employee may enforce that statutory right and also creates a public agency, the Equal Employment Opportunity Commission, which "is empowered . . . to prevent any person from engaging in any unlawful employment practice," 42 U.S.C. § 2000e-5(a).

It is thus apparent that Congress did not commission labor unions, which are *majoritarian* organizations, to serve as Congress' agent in enforcing the *individual* rights created by Title VII. It follows that nothing in Title VII justifies impairing the national policy of free collective bargaining, which is precisely what the decision below does. To safeguard the national labor policy—and to resolve the conflict among the circuits—the Court issue a writ of ceritorari.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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